



1 In Title 28 of the United States Code, Section 2255 provides that if a petitioner's  
 2 motion, file, and records "conclusively show that the movant is entitled to no relief," the  
 3 Court summarily may dismiss the motion without sending it to the United States  
 4 Attorney for response. *See* 28 U.S.C. § 2255(b). The rules regarding Section 2255  
 5 proceedings similarly state that the Court summarily may order dismissal of a Section  
 6 2255 motion without service upon the United States Attorney only "[i]f it plainly appears  
 7 from the face of the motion, any attached exhibits, and the record of prior proceedings  
 8 that the moving party is not entitled to relief . . . ." Rule 4(a), Rules governing Section  
 9 2255 Proceedings for the United States District Courts, 281 U.S.C. foll. § 2255 (West  
 10 2009). Thus, when a movant fails to state a claim upon which relief can be granted, or  
 11 when the motion is incredible or patently frivolous, the district court may summarily  
 12 dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989);  
 13 *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

14 A defendant may waive his right to file a Section 2255 motion to challenge his  
 15 sentence, but such a waiver must state so expressly. *United States v. Nunez*, 223 F.3d  
 16 956, 959 (9th Cir. 2000). However, a defendant may not waive an ineffective assistance  
 17 of counsel claim challenging the knowing and voluntary nature of the plea agreement or  
 18 the voluntariness of the waiver itself. *United States v. Rahman*, 642 F.3d 1257, 1259  
 19 (9th Cir. 2011); *United States v. Jeronimo*, 398 F.3d 1149, 1156 n. 4 (9th Cir. 2005).  
 20 Petitioner's plea agreement states in part:

21 In exchange for the Government's concessions in this plea agreement,  
 22 defendant waives, to the full extent of the law, any right to appeal or to  
 23 collaterally attack the guilty plea, conviction and sentence, including any  
 24 restitution order, unless the Court imposes a custodial sentence above the  
 25 greater of the high end of the guideline range recommended by the Govern-  
 26 ment pursuant to this agreement at the time of sentencing or statutory  
 27 mandatory minimum term, if applicable. If the custodial sentence is greater  
 28 than the high end of that range, the defendant may appeal, but the Government  
 will be free to support on appeal the sentence actually imposed. If defendant  
 believes the Government's recommendation is not in accord with this  
 agreement, defendant will object at the time of sentencing; otherwise the  
 objection will be deemed waived. If the defendant breaches this plea agree-  
 ment, at any time, in any way, including, but not limited to, appealing or  
 collaterally attacking the conviction or sentence the Government may  
 prosecute defendant for any counts, including those with mandatory minimum  
 sentences, dismissed or not charged pursuant to this plea agreement. Addition-

1       allv. the Government may use any factual admissions made by defendant  
2       pursuant to this plea agreement in any such prosecution.  
3       ( 3:11-cr-010200-AJB, Doc. No. 11 at 3.) The Ninth Circuit approves of such waivers  
4       on public policy grounds, reasoning that finality is “perhaps the most important benefit  
5       of plea bargaining” *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).  
6       Courts will generally enforce a defendant's waiver of his right to appeal if: (1) “the  
7       language of the waiver encompasses the defendant's right to appeal on the grounds  
8       claimed on appeal,” and (2) “the waiver is knowingly and voluntarily made.” *United*  
9       *States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998). Here, defendant’s sentence  
10      was below the high end of the guideline range recommended by the Government  
11      pursuant to the agreement at the time of sentencing. The government submitted a  
12      guideline range of 46 to 57 months, and the court sentenced defendant to the low end.  
13      The Court concludes that both of these requirements are met for a waiver to exist in this  
14      case. Accordingly, Petitioner's motion is barred and must be dismissed because of his  
15      plea agreement waiver.

16      Even if Petitioner had not waived his right to attack his conviction and sentence,  
17      Petitioner's motion would fail on the merits. Petitioner lacks any support for his  
18      arguments that the Court should make a departure because Petitioner initialed and signed  
19      the plea agreement which clearly stated the Adjusted Offense Level totaling nineteen  
20      (19)<sup>1</sup>. Combined with a Criminal History Category of IV, the resulting guideline range is  
21      forty-six (46) to fifty-seven (57) months. Petitioner argues that he should have been  
22      sentenced to an Adjusted Offense Level of fifteen (15): base level for crime sentenced of  
23      twelve (12) points, plus prior conviction upper enhancement of six (6) points, less  
24      reduction for accepting responsibility of three (3) points. However, nothing in the record  
25      supports Petitioner’s contention and calculation.

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28      <sup>1</sup> Base offense level of eight (8), plus prior conviction upper enhancement of sixteen (16), less  
adjustment made for acceptance of responsibility of three (3) and fast track of two (2), totaling nineteen  
(19).

1 What the United States Attorney chooses to offer as part of any plea agreement is  
2 within the province of the United States Attorney. The Court is prohibited from partici-  
3 pating in the plea bargaining process. Fed. R. Crim. P. 11(c)(1).

4 At sentencing, and by statute, the Court may depart downward only if there are  
5 "aggravating or mitigating circumstances . . . not adequately taken into consideration by  
6 the Sentencing Commission." In sentencing Petitioner, the Court considered all of the  
7 potential departures available in determining the advisory guidelines applicable in this  
8 case.


9 In addition, under 18 U.S.C. § 3553(b) and by law, the Court can depart outside  
10 the Advisory Guideline System for reasons set forth in the factors of and policy reasons  
11 behind the Federal Sentencing Statute, 18 U.S.C. § 3553(a). All relevant factors were  
12 taken into consideration at the time of Mr. Escobar-Garibaldi's sentencing.

13 **CONCLUSION**

14 Based on the foregoing reasons, the Court DENIES Petitioner's Motion to Vacate  
15 Under 28 U.S.C. § 2255. (Doc. No. 35)

16  
17 IT IS SO ORDERED.

18  
19 DATED: September 25, 2013

20   
21 Hon. Anthony J. Battaglia  
22 U.S. District Judge  
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